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JUDGMENT AGAINST ASSURED COLLECTIBLE FROM INDEMNITY COMPANY AS GARNISHEE.

The Supreme Court of Minnesota appreciates the inherent injustice of an indemnity company asserting and exercising the right to control the defence of an action against its assured and yet thereby assuming no liability, either direct or indirect, as to any judgment that may be rendered. Patterson v. Adan, 138 N. W. 281.

This case is very interesting. The facts show that an indemnity company took sole charge of a defense in an action for damages against its assured, under the usual terms in policies by such companies. One of the conditions of the policy was that: "No action shall lie against the company to recover for any loss or expense under this policy, unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after trial of the issue."

There was a verdict for plaintiff, motion for new trial, an appeal, the lower court reversed, a second trial, another verdict for plaintiff, and another appeal without any supersedeas bond. The opinion says: "The company carried on all the steps in the litigation, including the present appeal in the main action; but upon advice of counsel no supersedeas bond was given, because defendant was then thought to be insolvent."

Pending the appeal, plaintiff took out execution and garnished the indemnity company and the lower court was reversed in its holding that there was no liability to the assured that was subject to garnishment, the Supreme Court admitting that it was "intended by the company so to frame the policy that not every avenue of escape from payment in case of loss should be closed."

The opinion said: "The company assumed the defense and has carried on the litigation to the bitter end, even after defendant left this jurisdiction. The assured retained no voice or interest in the litigation. The company substituted its interests and its judgment for that of the assured in the action. *By so doing, it assumed a relation to this plaintiff, and to every plaintiff, where under its policy it steps into a suit, which must be considered in construing the contract.*[1] Neither public policy nor legal principles can be invoked against the validity of these provisions, if they mean no more than an undertaking to contest an asserted claim against the assured, for which it is liable when it is established; but if, under pretense of an insurance obligation, the company carries on litigation in the name of one who has neither voice nor interest therein, and which does not affect the company itself, because the assured is unable or unwilling to pay if plaintiff is awarded judgment, it would seem the company becomes an officious intermeddler. Public policy does not permit a litigant to so surrender control of his lawsuit to one who has no interest in the cause of action. A contract between client and attorney, although the attorney has a lien for his fees on the cause of action, is void, if the client is excluded from control of the cause of action. The policy here should be so interpreted, if possible, that its provisions do not run contrary to law, and that result is reached by holding that the undertaking to defend means something more than carrying on litigation in court."

This Journal repeatedly has shown its full concurrence in the view so well expressed about public policy in respect to such a contract as the Minnesota court was construing, as see 73 Cent. L. J. 147; 71 id. 39-46, and we took the view, that a company stepping into a suit might be compelled, on motion of plaintiff's counsel, to step out of it.

The Minnesota court says so much that is excellent, in the excerpt we have made, that it seems objecting, *ex industria*, to

(1) Italics are ours.

criticise any part of what is said. But principle is principle, and it should be defined clearly, if possible.

If the court means to say that, even under such policy, interpreted so as to come within public policy and to make an indemnity company other than "an officious intermeddler," plaintiff may be barred from objecting to its taking up and carrying on the defense, we think it is in error. If it means that by stepping into the case by plaintiff's acquiescence, the company thus adds its liability to that of the defendant, there is much in the law of estoppel to justify such a view. Certainly the plaintiff is not bound by any private understanding between the company and its assured.

Just as this is true, so also is it true that plaintiff is not bound to recognize any interest the company may have in the litigation arising out of its contract with assured. Plaintiff has as much right to call that officious intermeddling, as where the contract was such as the indemnitor claimed it to be in the case before the court. It is contrary to public policy for a defendant to substitute another for himself against the consent of a plaintiff. This general principle may have one or two exceptions, but it is a good general principle and exemplifies the rule against barratry.

This argues nothing, however, against the court's view of officious intermeddling being against public policy or its using this principle as a means of interpretation of the policy, however much we may think it was given excessive vigor in this instance. Certainly, however, it is well within legislative policy to declare that no indemnity company may force recognition of itself in negotiations for settlement, or control defenses in suits against those they insure, unless it assumes some obligation over and beyond the letter of its policy. We also believe, that statute may prescribe, in view of the great public benefit from employers' liability insurance, that an indemnity company may substitute itself as party defendant or as a co-defendant. When it does this, however, it should compel it to appear in the open. A plaintiff has a right to know whom he is opposing, so that, if he needs both mesne and final process, he may apply for it.

NOTES OF IMPORTANT DECISIONS

CRIMINAL LAW—MODIFYING SENTENCE BY APPELLATE COURT.—In the Criminal Procedure Act of Oklahoma it is provided that: "The Appellate Court may reverse, affirm or modify the judgment appealed from, and may, if necessary, or proper, order a new trial." The Criminal Court of Appeals of that state holds that: "Under this statute, this court exercising its revisory jurisdiction, has the power and authority to modify any judgment appealed from by reducing the sentence." It says also that the power "should not be exercised, unless it is apparent that injustice has been done." Fritz v. State, 128 Pac. 170.

The opinion relies entirely upon the statute and suggests, though it does not expressly say, that modification which would operate in any other way than in reduction would be unconstitutional. In this way, at least, we construe what is said, though as a matter of fact, it was only necessary for the disposition made of the case to decide no more than that the court had the right to reduce. We will also say in passing, that the exercise of the power ought not to wait upon the fact that "it is apparent (meaning, we suppose, manifest) that injustice has been done." Power and duty go hand in hand and an accused ought to have every presumption in his favor in appellate courts, as elsewhere he has.

But this procedure, after the manner of the English Court of Appeal, barring the right to increase, as well as reduce, sentences, shows progress of a commendable kind. Especially does this seem needed in a state like Oklahoma, who has a governor with a settled policy "to commute in all cases where the death penalty is imposed." What law gives him the right to have such a "policy?" The court rightly declares that such a judicial power "is in no sense the power of commutation of the sentence of the lower court," but "it is an award of justice," while the governor's power "is an act of grace." The former is true; the latter is not. They are both awards of justice. It is further said: "Commutation is a matter of discretion and may be refused. Justice is imperative and must not

be denied." The former of these two things is not true; the latter is true, unless by "discretion" is meant a legal discretion, which is as imperative as "justice." The Oklahoma court expresses itself ill, and, where the state's highest criminal court is so badly confused, it may not be wondered at, that its governor assumes to have such a "policy" as is ascribed to him. It is time everybody "drest in a little brief authority" should take the law as their "policy."

POLICE POWER — DISCRIMINATING AGAINST JUNK DEALERS IN THE PURCHASE OF STOLEN PROPERTY.—New York statute requires that the scienter in the offense of purchasing or receiving stolen property shall consist in knowing that it has been stolen. This statute was amended so as to make dealers in "junk, metals or second-hand materials" buying or receiving the same "without ascertaining by diligent inquiry that the person selling or delivering the same has a legal right to do so," guilty of "criminally receiving stolen property."

The New York Court of Appeals construed this amendment, not as meaning that a junk dealer was put on his peril of ascertaining whether the seller had a legal right to sell, but he is only to make diligent inquiry whether he had such right. It was claimed that such interpretation did not save the statute from unconstitutionality. Rosenthal v. New York, 33 Sup. Ct. 27.

It was admitted by counsel claiming unconstitutionality that city ordinances requiring licensed junk dealers to take from sellers of junk written statements as to when, where and from whom, offered property was obtained and file same with chief of police and that property purchased shall be held a certain number of days and tagged to show the particulars of purchase, are within the rightful regulation of such businesses.

It was claimed, however, that, though the New York court also held that the presence of circumstances that should have put a prudent man on inquiry is the equivalent of actual knowledge of property being stolen, yet it is an unreasonable classification to make a junk dealer guilty of criminally receiving stolen property, whether the circumstances of its being offerred for sale are the equivalent of actual knowledge or not, when nobody else need make inquiry and nobody else may be convicted of criminally receiving stolen property, unless first there is actual or implied knowledge of its having been stolen.

It seems to us ordinances of the kind referred to are greatly different from such a statute as was before the court. They merely provide a means for tracing property in the possession of a dealer whose business is subject to regulation. Here, however, a felony is created in not making diligent inquiry about a matter coming to a licensed business in due course. Can it be enacted within the due process of law clause, that offering junk to a junk dealer is implied knowledge to him that the junk has been stolen, when such would not be the same knowledge to any other to whom it is offered?

The court seems to think it can be, because "junk dealers provide an important market for stolen merchandise of the kinds mentioned." It was also thought reasonable to do this because the experience of junk dealers "is peculiarly fitted to detect whether property offered is stolen property."

To us both of these reasons appear extraordinary. A man is thus made liable criminally because so many thieves deal with him, under his license, whether a particular customer is suspicious or not. Secondly, he has peculiar ability to detect crime whether he is put on notice about it or not, and his past experience is a factor in the crime. Here is a distinction between capax doli and capacior doli, to us a very novel distinction.

This seems to us a far stretch from the ordinances we have noticed in the mere regulation of business. It is rather the creating of an intent to commit a crime by a class of individuals, when their non-observance of regulations affecting their business has no necessary relation to the commission of that crime. If not, is it arbitrary and unreasonable to say it partakes of the crime?

LEGAL NEWS FROM EUROPE.

Variation of a Written Contract by Parol Evidence in Bohemia.—Mr. and Mrs. B. bought of S. a graphophone. The deal was consummated by the signing of a written contract by both parties. The dealer sued the buyers for the purchase price and the defendants pleaded as a defense the alleged fact that the written contract does not embody the real agreement of the parties. The nisi prius court rendered judgment for the plaintiff. But on appeal the Supreme Court of Bohemia reversed the finding of the lower court, holding that a written contract is conclusive only when it embodies

the real agreement of the parties. In this case it was shown by extraneous evidence that the parties had agreed upon a return of the instrument within a year in case it did not prove satisfactory, and the contract signed was silent as to this understanding. It cannot be said, therefore, that Mr. and Mrs. B. in signing the contract assented to its contents in so far as the contract failed to set forth completely the understanding reached. It is evident that the lower court received extraneous evidence to vary the written contract but finally refused to consider it, and that the appellate court reached the conclusion that such evidence should have been considered and judgment rendered accordingly without a reformation of the contract as would be required by our practice.

Divorce in Belgium.—Section 298 of the Belgian civil code prohibits marriage of persons who have committed adultery together. A bill for the repeal of this inhibition was recently voted down by the Belgian Senate. Senator Van de Walle requested on this point the opinion of Brieux, member of the French Academy, and famous as the author of the "Red Robe." The playwright answered substantially, as follows: "My dramas, especially 'Le Berceau' and 'Suzette,' express the idea that divorce should be made more difficult where there are children as a result of the marriage; for the benefit of the children divorce should not be asked. But I judge when a divorce is once granted that it is best to permit the parties concerned to found a new home. Where there is issue, divorce should be granted only in exceptional cases, but the legislator should endeavor to remove all possible obstacles to a remarriage. I am for the abolition of section 298. The only reasons against its repeal are Catholic reasons, but the Catholics should not object when from their point of view the divorced parties can live only in concubinage. Therefore, they should be indifferent in the matter." Section 298, which is under discussion, reads as follows: "Where the court grants a divorce on the ground of adultery, the guilty party shall never be allowed to enter into matrimony with its accomplice. On motion of the prosecutor an adulteress may be committed to a reformatory for a period of from three months to two years."

Divorce and Adultery in France.—Senator Martin, author of the work "Droit Civil," has prepared a bill regulating voluntary divorces or divorces by consent of both parties, guardianship matters and punishment for adultery. Martin bases his bill on the assumption that even to-day divorces are obtained as a result of mutual consent, but that such consent is usually accompanied with a scandal, such as pretexts of cruelty, surprising one another in the act of adultery and similar agreed upon subterfuges, and the threshing out of such fictitious causes for divorce in the courts. Children learn of these things and parents suffer in their eyes morally. Mr. Martin also insists that punishment of women for adultery be the same as that of men. Now an adulteress in France is punished by imprisonment for a period of from three months to two years; her accomplice is subject to the same punishment and in addition to that to a fine of from 100 to 2000 franks. But an adulterer is punished by a fine of from 100 to 2000 francs, but only in cases where the act has been committed within the precincts of his and his wife's home. This difference is usually justified by a plea that woman's adultery is worse in its social results because it brings into the family strange children on an equal footing and with the same rights as those enjoyed by legitimate offspring. Martin says that such a child has at least a home and a family by which it is taken care of. A husband's adultery, he maintains, is fraught with graver consequences in its social aspects. If a married man seduces a young girl, what becomes of her and her child? It should be noted, however, that French judges of late years have been equalizing as much as they could the punishment for adultery by the two sexes and thus to a large extent have anticipated Senator Martin's proposed law.

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ANTINOMOUS SECTS OR SCHOOLS.

At this time the integrity of the law is dismembered by the contention of various sects or isms. Two of these warring sects may be perceived by consulting Cooper v. Reynolds[1] with Windsor v. McVeigh.[2] Justice Field dissented in Cooper v. Reynolds and Justice Miller dissented in Windsor v. McVeigh. Justice Field was led by the view, that what did not appear did not exist. He always advocated and respected

(1) 10 Wall. 308; stated, sec. 70, Hughes' Equity in Procedure, also discussed sections 253, et seq., Hughes' Equity in Procedure.

(2) 93 U. S. 274; Hughes' Procedure, 54-70, sec. 253, Hughes' Equity in Procedure.

the maxim, *De non apparentibus et non existentibus eadem est ratio.* On the other hand, Justice Miller did not recognize the maxim last cited, but therefor applied the maxim, *Omnia praesumuntur rite et solemniter esse acta* (All acts are presumed to have been rightly and regularly done). These judges never agreed as to the proper applications of these maxims. Relating to them they often dissented. As to these maxims there has arisen two schools. One may be called the *coram judice* school and the other the *coram non judice* school. These two schools should be well comprehended. Therefore we will further observe that:

The *coram judice* school perceives government in all the affairs and relations of men. They see that the welfare of the state necessarily limits the power of state agencies, and especially of courts, as is discussed in Windsor v. McVeigh and Clark v. Dillon.[3] They view a court's record as a constitutional implication and indispensable for certainty and protection. That this record is necessary for *res adjudicata* (*Interest reipublicae ut sit finis litium*), for "Due Process of Law," to resist objections upon collateral attack, for the division of state power, for the removal of causes from one court to another and from one system of courts to another system of courts, as from state to federal courts, also to serve purposes before trial, at trial and after trial; to define the issues, to limit evidence and to confine argument, and to show what the material issues were when the jury and when the witnesses are sworn; the elements of perjury require a certain and material issue; the issue is the basis of the maxim, *Frustra probatur quod probatum non relevat.* (It is vain to prove what is not alleged) or in other words, "the evidence must correspond with the allegations and be confined to the point in issue." See 35 Am. Bar Assn. Rep. 56, *et seq.*

There are more reasons than can be enumerated here, why there must be pleadings and why the following is a true definition, namely, "Pleadings are the juridical means of investing a court with jurisdiction of a subject-matter to adjudicate it." Sec. 47, 48, Hughes' Equity in Procedure.

The *coram judice* school requires the certain allegation, admission, denial and its consequent issue. Dickson v. Cole.[4] This school also keeps prominent and vindicates the first rule of evidence, which is, namely, "What ought to be of record must be proved by record and by the right record." This rule incidentally involves the rule of oral evidence.

This school perceives the state or public as a *third* and *silent* party to the record, whose "substantial rights" cannot be waived. *Res inter alios acta.* That the state's wards, the infant, the insane, the married woman, the Indian, the soldier and the sailor in some places, and whoever is accused of grave crimes, such as are felonies, are incapable of waiving any right, *formal* or otherwise. The wards of the state cannot waive the rights and safeguards given them. To illustrate: An infant cannot waive the service of process.

The *coram judice* school respects the cause for the general demurrer as concerning the state's interests, which cannot be waived, but may be raised at any time and in any way—at the motion in arrest, or *non obstante veredicto,* orders of repleader, in appellate procedure, on collateral attack and at tests for substance on a plea of *res adjudicata.* The general demurrer and its correlatives safeguard the wards of the state. They cannot waive these barriers of protection.[5]

All litigants, both plaintiffs and defendants, are the wards of the state in regard to their substantial rights—their right to the *coram judice* proceeding—"Due Process of Law"—and that this be properly evinced by the right record—the *mandatory* record. Herefrom it must appear there

(3) N. Y.

(4) Leading Case (Key Number) 34, 3 Grounds and Rudiments.

(5) Clark v. Dillon, 97 N. Y. 370.

was notice and a hearing consistent with that notice—with the matter or thing described in the pleadings, and a judgment entered in accordance with that notice and that hearing. To illustrate: In neither a civil nor a criminal case can one thing be alleged and a different thing proved and bound by judgment, without regard to what the pleadings described.[6]

There is no difference between civil and criminal cases as to the jurisdictional functions of pleadings.[7] The theory of the case advocates deny the latter proposition. Thus they deny the philosophy of procedure.

The *coram judice* school accepts the view that there are organic principles of procedure which are mottoes of government and that are above and beyond abolition or immolation by *local* and *fiat* laws.

The Coram non Judice School—This school denies all of the above propositions.[8] They contend for new definitions of pleadings, and such as this: "That a pleading is sufficient if only it will authorize the reception of evidence."[9]

In a varied language Kansas has its supposed new rule.[10] Also that statutes can make void things valid.[11] And Wisconsin appears to be ready to adopt something new.[12]

Another definition is, that "pleadings are merely to apprise the adverse side, and like any other notice, they may be waived.[13] What has happened in Nevada may be judged from Gulling v. Bank.[14] In Missouri it is demurrable to set out a copy of the instrument sued on,[15] also that a court of errors—the supreme court—is not bound by the record removed before it, but that a respondent's silence in court to irrelevant arguments invests the appellate court with jurisdictional facts to consider over and beyond the record presented. That a court of errors may gather facts for itself.[16]

It is also declared that a statute may declare a conclusion of law a sufficient record for the exercise of judicial power;[17] that the cause for the general demurrer may be disregarded;[18] that the maxim, *verba fortius accipiuntur contra proferentem* (Every presumption is against the composer, or pleader) may be abolished;[19] that this universal, fundamental, organic principle is nevertheless a matter of *local* or *fiat* law.

The theory-of-the-case school is another name for the *coram non judice* school. They deny that a recovery must be *secundum allegata et probata;* they permit variances, departures from the record; they deny that a court is bound by its record and that consent cannot confer jurisdiction. They waive the pleadings. They do not discuss the general demurrer and its correlatives connectedly; they rarely, if ever, cite the fundamentals; they deny the interactions of pleadings with the conserving principles of procedure.[20]

The *coram non judice* lawyer is a poor constructionist. He does not see the attitude of the state, and that for the state and its attitude there is on one hand *substance,*

(6) Bristow v. Wright (Mansfield); sections 10, 25, 28; Story's Equity Pleading; Clark v. S. (Miss.), 35 L. R. A. (N. S.) 193, 57 So. 209; Lemay, 210 Mass., 31 L. R. A. (N. S.) 63, 96 N. E. 797; Chitty v. Iron Mt. R. R., 148 Mo. 64; Greco, 84 Kans. 111, American Cas. Ann. A. 1912, 638.

(7) 1 Greenleaf's Evidence, sec. 65; see authorities above cited. Cf. 2 Thompson's Trials 2313.

(8) See titles, Theory of the Case and Variance, 4 Grounds and Rudiments.

(9) Clark v. West, 193 N. Y. 349, 86 N. E. 1.

(10) Brumbaugh, 82 Kans. 53.

(11) Duforne, 82 Kans. 159.

(12) Bieri v. Fonger, 139 Wis. 150; Gross Coal Co., 148 Wis. 72, 74.

(13) 2 Thompson's Trials sections 2310, 2311, quoted under title, Variance, 4 Grounds and Rudiments.

(14) 29 Nevada 266-280; Cases.

(15) Estes, 155 Mo. 577.

(16) S. v. Fasse, 189 Mo. 532, 537.

(17) Weber (N. D.) 34 L. R. A. (N. S.) 364-372, n.

(18) Pierson, (S. D.) 38 L. R. A. (N. S.)

(19) Cf. Sections 533, 546, Pomeroy's Code Remedies. See this question discussed in Bradbury's Rules of Pleading, pages 9-16, section 6, wherein Clark v. Dillon is followed, also denied, questioned, modified, abolished, ignored and renounced.

(20) Sections 83-123, 1 Grounds and Rudiments.

which cannot be waived, while as to *formal* matter, it can be waived on the other hand, for the reason *formal* matter does not concern the state, but only the parties to the record. He is blind as to the state and therefore never perceives the philosophy of the *mandatory* record, of the general demurrer and its correlatives, and that construction relating to these matters is always the same, and is always from conceptions of pleadings being more than "notice and to apprise the opposite party," that these are only for the average intellect or person of "common understanding." From the latter definition he has fluctuating rules of construction, and from various datum posts and 1st, before trial; 2nd, at trial, and 3rd. after trial; and a liberal rule at the stage of collateral attack, but a strict rule at the stage of testing the record for a plea of *res adjudicata*, where the rule is, the judgment must be within the issues or allegations in the pleadings, and that "estoppels are odious and are strictly taken," or in other words, *Verba fortius accipiuntur contra proferentem* (Every presumption is against the pleader, or composer). He does not know the philosophy of the latter maxim and that another name for it is the burden of proof; that it has many forms of expression He thinks this maxim *is a trite and commonplace rule of pleading* only, but ask him to pause, consider and name a greater one and you will find that he cannot do it. Then he will cavil about the form of expression. He does not know that the fundamental principles of government are the supposed trite and commonplace rules of pleading. His arguments, his briefs, his writings will prove all of the above facts. To him the law is a gathering of statutes and cases and single instances. He cannot intelligently discuss the true limitations of liberal construction —of aider by pleading over, by verdict, by judgment and the Statute of Amendments and Jeofails. He does not know the philosophy of *Consensus tollit errorem* on the one hand and of *Quod ab initio non valet intractu temporis non convalescit* on the other hand. He does not perceive that the supposed new definitions of pleadings are loose, equivocal and uncertain unless they are construed with the old law. He cannot discuss the maxims and cases we have cited. Generally he will express a contempt for them, or cavil over their origin or form of expression. He cannot quote, cite or explain a fundamental, nor can he construe the Statute of Amendments and Jeofails in accordance with cases like Clark v. Dillon,[21] and C. & A. R. R. v. Clausen.[22] These are cases that have not been understood by the *coram non judice* school. They do not perceive the attitude of the state and the means of the state to insure protection.

Bishop thought the law an entirety (page vi, Preface Bishop's New Criminal Law). Cooley thought that criminal law and criminal pleadings were individualized subjects. Page xxiii, Preface Cooley's Blackstone. Likewise equity. Page xxvii, *id.*

Bliss and Cooley saw nothing new as to *substance* in Codes, while Professor Pomeroy and his followers viewed the Code as a "new dispensation." Paragraph 2, Preface Pomeroy's Code (1876); also his sections 75, 509, 514, 533, 546, 592, *et seq.*

Kent thought Parliament omnipotent. 1 Kent, 448. Cooley thought the contrary. Pages lx-xi, Preface Cooley's Blackstone. And therein Cooley commended Chitty, Gould and Stephen and their editors, who were all local and fiat-law writers. Not one of them comprehended the prescriptive constitution; for they believed that "Parliament is omnipotent."

Such were the views of various authors and judges.

When its philosophy is lost the law is lost.

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(21) 20 supra.
(22) 173 Ills. 100, 103.

DIVORCE—PROHIBITING REMARRIAGE.

WILSON v. COOK.

Supreme Court of Illinois, December 17, 1912.

100 N. E. 222.

Every state has the power to enact laws which will personally bind its citizens while sojourning in a foreign jurisdiction provided such laws profess to so bind them, and to declare that marriages contracted between its citizens in foreign states in disregard of the statutes of the state of their domicile will not be recognized in the courts of the latter state, though valid where celebrated.

DUNN, C. J.: On November 13, 1906, the appellant, Robert J. Cook, obtained a divorce from his wife in Clinton county, in this state, and on February 13, 1907, was married in St. Louis, Mo., to Mary A. Moore, who resided in Madison county, in this state. Thereafter, until her death, on January 4, 1912, they resided together as husband and wife on certain premises owned by her in Madison county. Robert J. Wilson was appointed administrator of her estate, and filed a petition in the probate court to sell the real estate on which they had lived, to pay debts, making the appellant a defendant, and alleging that the appellant claimed to have been the husband of the deceased at the time of her death, and was in possession of the real estate described in the petition, claiming to be entitled to homestead and dower therein. The appellant answered, alleging his marriage to Mary A. Cook as above stated, that they resided on the premises in question at the time of her death, and that he was entitled to homestead and dower therein. Upon a hearing the court found that appellant was not the husband of the deceased, and was not entitled to homestead and dower in the premises, and entered a decree of sale, from which this appeal is prosecuted.

(1, 2) The first question in the case is whether or not the marriage of the appellant and the deceased was valid. Section 1a of chapter 40 (Hurd's Stat. 1911, p. 862) provides: "That in every case in which a divorce has been granted * * * neither party shall marry again within one year from the time the decree was granted; * * * and every person marrying contrary to the provisions of this section shall be punished by imprisonment in the penitentiary for not less than one year, nor more than three years, and said marriage shall be held absolutely void." The marriage of the appellant was within one year from the time the decree of divorce was granted. It is undoubtedly the general rule of law that a marriage valid where it is celebrated is valid everywhere, but there are two well-recognized exceptions, viz., marriages which are contrary to the law of nature, as generally recognized by Christian nations, and those which are declared by positive law to have no validity. Every state has the power to enact laws which will personally bind its citizens while sojourning in a foreign jurisdiction provided such laws profess to so bind them, and to declare that marriages contracted between its citizens in foreign states in disregard of the statutes of the state of their domicile will not be recognized in the courts of the latter state, though valid where celebrated. Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81. The question, therefore, is whether the statute quoted was clearly intended to apply to marriages contracted outside the state, for, unless the intention is clear, the operation of the statute must be limited to marriages within the state.

Formerly laws of this character in other states have usually prohibited the marriage of the party in fault against whom the divorce was granted, and they have been construed as penal in their nature and having no extraterritorial effect. Marriages contracted outside the state have in this view been held valid in states having such statutes. Commonwealth v. Lane, 113 Mass. 458, 18 Am. Rep. 509; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; State v. Shattuck, 69 Vt. 403, 38 Atl. 81, 40 L. R. A. 428, 60 Am. St. Rep. 936; Frame v. Thorman, 102 Wis. 654, 79 N. W. 39. This statute is not, however, penal in its character. It is no part of its purpose to punish the wrongdoer, for it treats the innocent and the guilty alike. The state of Wisconsin has a similar statute, which came before the Supreme Court, and the language of the court is applicable here: "Upon no reasonable ground can this general restriction be explained, except upon the ground that the Legislature deemed that it was against public policy and good morals that divorced persons should be at liberty to immediately contract new marriages. The inference is unmistakable that the Legislature recognized the fact that the sacredness of marriage and the stability of the marriage tie lie at the very foundation of Christian civilization and social order; that divorce, while at times necessary, should not be made easy, nor should inducement be held out to procure it; that one of the frequent causes of marital disagreement and divorce actions is the desire on the part of one of the

parties to marry another; that, if there be liberty to immediately remarry, an inducement is thus offered to those who have become tired of one union, not only to become faithless to their marriage vows, but to collusively procure the severance of that union under the forms of law for the purpose of experimenting with another partner, and perhaps yet another, thus accomplishing what may be called progressive polygamy; and, finally, that this means destruction of the home and debasement of public morals. In a word, the intent of the law plainly is to remove one of the most frequent inducing causes for the bringing of divorce actions. This means a declaration of public policy or it means nothing. It means that the Legislature regarded frequent and easy divorce as against good morals, and that it proposed, not to punish the guilty party, but to remove an inducement to frequent divorce. To say that the Legislature intended such a law to apply only while the parties are within the boundaries of the state, and that it contemplated that by crossing the state line its citizens could successfully nullify its terms, is to make the act essentially useless and impotent and ascribe practical imbecility to the lawmaking power. A construction which produces such an effect should not be given it unless the terms of the act make it necessary. The prohibitory terms are broad and sweeping. They declare, not only that it shall be unlawful for divorced persons to marry again within the year, but that any such marriage shall be null and void. There is no limitation as to the place of the pretended marriage in express terms, nor is language used from which such a limitation can naturally be implied. It seems unquestionably intended to control the conduct of the residents of the state, whether they be within or outside of its boundaries. Such being, in our opinion, the evident and clearly expressed intent of the Legislature, we hold that when persons domiciled in this state and who are subject to the provisions of the law leave the state for the purpose of evading those provisions, and go through the ceremony of marriage in another state and return to their domicile, such pretended marriage is within the provisions of the law and will not be recognized by the courts of this state." Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. Rep. 1085. The following cases are cited as sustaining the view expressed in the opinion: Brook v. Brook, 9 H. L. Cas. 193; Sussex Peerage Case, 11 Cl. & F. 85; State v. Tutty (C. C.) 41 Fed. 753, 7 L. R. A. 50; Pennegar v. State, 87 Tenn. 244, 10 S. W. 305, 2 L. R. A. 703, 10 Am. St. Rep. 648; McLennan v. McLennan, 31 Or. 480, 50 Pac. 802, 38 L. R. A. 863, 65 Am. St. Rep. 835; Stull's Estate, 183 Pa. 625, 39 Atl. 16, 39 L. R. A. 539, 63 Am. St. Rep. 776. These cases sustain the principle that where a state has enacted a statute lawfully imposing upon its citizens an incapacity to contract marriage by reason of a positive policy of the state for the protection of the morals and good order of society aaginst serious social evils, a marriage contracted in disregard of the prohibition of the statute wherever celebrated, will be void. In the first of these cases it is said: "It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile if the contract is forbidden by the law of the place of domicile as contrary to religion or morality or to any of its fundamental institutions."

(3) It is insisted, however, on the part of the appellant, that the marriage was entered into in good faith, and that, the parties having, after the removal of the disability, continued the same apparently valid matrimonial relations as before, the law will presume a common-law marriage between them. The amendment to section 4 of the Marriage Act, which declared that common-law marriages thereafter entered into should be null and void, went into effect on July 1, 1905 (Laws 1905, p. 317). There can, therefore, be no presumption of a common-law marriage in this case.

The judgment of the probate court was right, and it is affirmed.

Judgment affirmed.

NOTE.—*Statutes Forbidding Remarriage as Invalidating Marriages Outside the State.*—The instant case seems well supported by authority, where such a statute indicates clearly a policy. This seemingly must be connected in no way, by construction or otherwise, with the imposition of a penalty, as is said to be the case when the prohibition refers only to the guilty party in the divorce case, though seemingly there is clearer reason for a policy as to him or her than in making the statute apply to both. Then, too, it would seem the policy must declare the second marriage, wherever performed, void, and, even then, it only covers a case where there is attempted evasion merely.

As the opinion in Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. Rep. 1085, supplies, so greatly, expression of the view taken by the instant case, it may be well also to state a suggestion of the opinion in the supporting case, which to us seems untenable and to weaken, somewhat, the force of the excerpt the instant case adopts. That court said: "Another view of the question, leading to the same result has been suggested to our minds, which will be stated. The statute cited

is an integral part of the divorce law of this state and in legal effect enters into every judgment of divorce. This being so, must not any judgment of divorce be construed as containing an inhibition upon the parties, rendering them incapable of legal marriage within a year, which must be given full faith and credit in all other states under Section 1, Article 4, of the Constitution of the United States? And if it be entitled to receive such faith and credit, how can a marriage within another state be considered valid anywhere? Are not the parties incapable of contracting such a marriage anywhere, for the reason that they have not yet been relieved of their incapacity to marry another, resulting from their former marriage, or, in other words, for the reason that their divorce is not complete, until the expiration of the year? We suggest these questions, without definitely expressing an opinion upon them or making them a ground of decision." It seems to us the suggestion has not much to stand upon. The divorce as a divorce, operates immediately and it *then* puts, by force of statute, upon the parties thereto a temporary disability. Were it not complete, it could create no such disability. *Eo instanti* this disability ceases, the parties stand to the former relation of husband and wife as they did before the disability ceased. The *res* went out of existence with the decree, but the parties formerly concerned have a status, which has something of analogy in liability for alimony installments—a sort of aftermath.

In addition to the cases the instant case cites, as cited by Lanham v. Lanham, *supra*, and as supporting both, may be mentioned State v. Fenn, 47 Wash. 561, 92 Pac. 417, 17 L. R. A. (N. S.) 800, which was a prosecution for bigamy, and the validity of the statute as prohibiting marriage, though outside of the state, was claimed as a defense. In other words, defendant married in British Columbia within the prohibited time and returning to the state and after living with the partner to this marriage, contracted a third marriage in the state. The prosecution was upon this last marriage. The state appealed from a ruling upon a demurrer to the information. The court said: "If the parties to the Victoria marriage had their domicil in this state at the time the marriage was contracted and went to Victoria for the purpose of evading our laws and therafter returning to this state, such marriage was null and void, and, much as we regret it, the prosecution must fail. If, on the other hand, the parties to the Victoria marriage were domiciled there at the time the marriage was contracted, such marriage does not fall within the prohibition of our statute, and is valid." Here is a very anomalous thing. An act forbidden by law may be set up as a defense to an accusation of crime and for the very reason that it was forbidden. Still, it seems a good defense, or rather it deprives the state of ability to carry the burden of proof in showing there was a lawful marriage existing when the alleged bigamous marriage was contracted. But it was the defendant's unlawful act that deprived the state of its requisite proof. This is a sort of exception to the rule, *omnia presumuntur contra spoliatorem*.

A recent case in Michigan, in which the statute refers only to the guilty party, stressed the distinction between such a statute and one forbidding marriage within the prohibited time by either party, the former being penal and the latter declaratory of public policy. The Michigan court said: "If a statute is so drawn as to clearly disclose a state policy which regards as void all marriages in disregard of the statutory restriction, wherever the marriages are celebrated, the courts must determine the rights of the parties accordingly." A dissenting opinion seemed to think there could be a public policy operative only as to the guilty party, as well as against both parties, and, therefore, the statute is not necessarily penal, merely, for its being aimed alone at him or her. Ex parte Crane (Mich.), 136 N. W. 587. It seems to us that many people might think it not only not necessary to link both in declaring the public policy, and that it even might be very unjust to include the innocent party. He or she would seem to have been punished enough already, and the state having the right to declare its policy may make it as large or as narrow as it pleases. If divorce is right, a citizen rightfully asking it should not be singled out from among others, for having done so, and, certainly, there is no reason for this singling out merely in his having been married.

In Minnesota the statute reads that: "No marriage shall be contracted while either of the parties has a husband or wife living; nor within six months after either has been divorced from a former spouse," or between parties in certain degrees of relationship nor where one is imbecile, etc. The court said: "The statute is prohibitory, and declares that marriage shall not be contracted between the parties mentioned, but does not declare the same, if consummated, void or a nullity." For this reason it was said the marriage within said six months could be subsequently ratified by conduct. State v. Yoder, 130 N. W. 10. Considering the connection in which the prohibition on divorced persons is placed, viz.: along with persons already married, those within prohibited degrees of relationship and where one of the parties is imbecile, etc., the reasoning of the court is quite extraordinary. The contractual incapacity is state policy and cohabitation afterwards could not validate a bigamous or incestuous marriage, nor one in which the imbecile had no capacity to ratify anything. This case admits the force of the cases the instant case cites in its support, but denies their application. They, however, declare a policy no more strongly than does the Minnesota statute, which condemns such remarriages along with bigamy and incest.

Even though there is a public policy which will follow a state's own citizens beyond its confines, as the instant and many cases hold, yet it would seem, that it will not take very convincing evidence for its non-application. Thus where a divorced party was persuaded to go to Victoria, B. C., and marry and she states that her second husband told her he intended to remain there, her going there *animo manendi* made the marriage valid whether his purpose was firm in this respect or not. The court said: "We know of no public policy which will warrant a court in annulling a marriage between competent parties, if there be any evidence to sustain it, and especially so where it appear that the parties have consummated the marriage, a child has been born and the offending party has been openly acknowledged as a spouse. It will not be done unless it clearly appears that the parties willfully went beyond

the jurisdiction of the courts of this state to avoid and defy our laws." Pierce v. Pierce (Wash.), 109 Pac. 45.

The cases, of course, confine the operation of the statute to those who retain their domicile where the statute is, and their stressing the fact about going into another jurisdiction merely to avoid the statute, suggests a query as to its being applicable when there is proof, that there was no such intent, but the second marriage was with a third party resident of another state, where the second marriage is had. Should this public policy extend to that kind of a case? Under a not dissimilar class of reasoning from that found in the case last above referred to, it might be thought the statute would not reach such a case, for partially, at least, the statute would have purely an extraterritorial operation, affecting a resident of another state. The main question suggests many difficulties and, perhaps, the state's policy should be administered with much discrimination, in view of the rights of children. C.

NOTES OF PROFESSIONAL INTEREST FROM CONTINENTAL EUROPE.

The war in Turkey has given rise to a peculiar controversy between the surgeons and wounded in the Bulgarian hospitals. The trouble is over the bullets which the former extract from the bodies of the latter. Both parties wish to retain them as souvenirs.

To whom do they belong? Or do they belong to either?

Do they perhaps belong to the Turks? The bullets were sent out to accomplish certain purposes. Having accomplished these, does the original owner's property in them cease? Has he abandoned them?

Granted that the ownership of the Turk has ceased, have the bullets become res nullius, to which the first possessor acquires title? Who is the first possessor, the soldier or the doctor?

Or, are the bullets res jacentes, the ownership of which is in the wounded soldier, as long as they remain within "his premises," but ceases and changes on every change of location?

Or, may the ownership be said to be in the Bulgarian nation as represented by its government, on behalf of whom and in whose service the soldiers went to battle and had themselves wounded?

Here seems to be a nice question for a debate in the sophomore class of a law school.

Article 340 of Code Civil (Napoleon) prescribes that "La recherche de la paternite est interdite." The reason for this law was fear of blackmailing schemes and of disturbing family relations. For nearly forty years efforts have been made in France to have the article revoked, but all have stranded upon the above mentioned fears, until they at last succeeded on November 16, 1912, under the leadership of Aristide Briand (Journal Officiel de la Republique Francaise, November 17, 1912, p. 9718). New rules were then adopted fixing the cases in which complaints against the putative father of an illegitimate child will be entertained, namely: 1—in case of kidnapping (enlevement) or rape (viol) at the time of conception; 2—in case of seduction (seduction) through fraud (manoeuvres dolosives), promise of marriage or engagement (promesse de marriage ou fiancailles) or when a prima facie case is made out by documentary evidence (commencement de preuve par ecrit) 3—in case letters or similar written statements of the putative father are produced which on their face show an acknowledgment of the paternity 4—in cases where, at the time of conception, the parties lived publicly together as husband and wife; and 5—in cases where the father has sustained and educated the child, wholly or partly, as his father. No complaint will be entertained, if the mother, at the time of the conception, lived as an abandoned woman (pater est Populus Romanus) or had intercourse with several men (pater est in incerto); 2—when the putative father, by reason of absence or other physical cause, could not possibly be the father of the child.

This law is, without doubt, a great advance from former conditions, but it will at once appear that even this new French law rests on a peculiar basis. The father is not made responsible because he is the father, but either because he has wronged the mother, or because he already, by word or act, has acknowledged his paternity.

It is said that the law was so restricted from a fear, that further responsibility placed on the father would act as an additional means of depopulating France. To this it has, with truth, been answered, that the better care assured babies by making the father contribute to their support would be worth many times more in keeping up the population of France.

The German Reichsgericht recently (Urt VI. 94-12, October 19, 1912) decided a rather peculiar case. The plaintiff was about to leave his house, and in his courtyard stood his carriage with two of his horses harnessed to it. Defendant came riding into the courtyard, and in passing the horses attached to the carriage, his horse and they sniffed at each other. It

appeared that defendant's horse had the glanders; it infected plaintiff's carriage horses, and through them, all of his other horses. Section 833 of the German Civil Code makes the owner of animals responsible for damage done by them. The Reichsgericht, however, nonsuited the plaintiff. What is intended to be covered by Section 833 is damage done by animals, because their animal instincts and tendencies have not been kept under control. Of course, if the defendant had known that his horse was infected with glanders, and, notwithstanding, took it to places where it was likely to come in contact with other horses, he would have been liable, although not under Section 833. No proof of such knowledge was produced, and the horse in this case played no other part than as a means of transportation, it did not act independently. The infection was not damage done by defendant's horse, in the meaning of Sec. 833.

The importance of trade marks is becoming more and more recognized, as well as the necessity of protecting them, not only locally, but internationally. At the International Congress for Applied Chemistry held in London in 1908, the Lord Chief Justice advocated international patents. At the congresses held in 1911, in Darmstadt of the Society for the Study of the Philosophy of Law and of Business, and in Heidelberg by the Society for Comparative Jurisprudence, the question was raised and discussed, whether it would be possible to obtain uniform international laws governing patents and trademarks.

Acting upon the impulse given by these congresses, "The Society for International Trademark-Law" was formed in Berlin in the fall of 1911. The following countries are represented among the Board of Governors: Germany, Argentine, Austria, Belgium, France, Great Britain and Ireland (Lord Moulton) Hungary, Italy, Holland, Russia, Sweden and Switzerland.

In various of the countries, committees have been appointed to collect and compare the laws governing the subject of all countries. The committees of Austria and Sweden have finished their work, that of Germany is nearing the end of its labors, and committees are at work in a number of other countries. When all reports have been received, those covering Europe will be referred to Dr. Pinzger of Magdeburg, and those from other countries to Dr. Breit of Dresden, both of whom will make a separate report founded thereon. The general report and proposal for an international treaty will be prepared by Dr. Kent of Frankford a-M.

In Russia, that part of the law, usually embodied in Civil Codes, is contained in Part I, Vol. X of that of 16 volumes consisting of collection of laws published in 1835, and commonly known as the "Swod Sakonow." Naturally, these laws have been amended from time to time, and new editions of the collection have been published, the latest in 1900. Notwithstanding these amendments, the law remains very crude. Since 1882, there has been sitting a commission to prepare a new Civil Code, which has worked very slowly, partly because to it has been referred the formulation of a number of special laws which the changing social conditions of Russia have made absolutely necessary, partly because the law as it now exists, to a large extent rests on early medieval conditions and principles, which it is hard by one step to transform so as to fit tolerably with modern relations.

However, in 1899, the first draft was published, and in 1903 and 1904 revised drafts appeared; the final draft appeared in 1905. But then the Minister of Justice called for opinions from a number of lawyers outside of the commission, and as a result a new revision took place, and it was not until after the assembly of the Fourth Duma, that the Minister felt himself justified in proposing the bill, and then that part only which deals with the law of obligations. The third Duma had in the meantime passed certain parts which had been singled out for separate treatment, but since then several treaties have been entered into which will necessitate radical changes.

The most difficult part of the commission's labors has been that connected with the formulation of a proper real estate law, a field in which the present law is most archaic. The draft proposes the introduction of a modified "Grundbuch" system, but has to meet the difficulty that there is no universal or dependable survey (Kataster) in existence.

AXEL TEISEN.

Philadelphia, Pa.

CORAM NON JUDICE.

REFORMING PROCEDURE THROUGH THE SUPREME COURT—NEVADA SUPPORTS THE NEW PLAN.

We have had much to say recently concerning the new committee of the American Bar Association on Uniform Procedure of which Mr. Thos. W. Shelton, of Norfolk, Va., is chairman.

Mr. Shelton's idea, as we have said heretofore, is that Congress shall set the Supreme Court free to form a code of procedure for the law side of the federal courts. When this is done by and through the co-operation of the entire profession, the effort to secure its universal adoption by the states will have the advantage of the prestige of the source of the code and of the desirability of having state procedure follow the procedure in the federal court as far as possible.

At the recent meeting of the Nevada Bar Association (November 15, 1912) this new idea was approved and the plans and work of the new committee on uniform procedure thoroughly indorsed.

Nevada thus enjoys the distinction of being first in line with the new movement for reforming procedure along conservative lines that promises such good results.

BOOK REVIEWS.

McELREATH ON THE CONSTITUTION OF GEORGIA, ANNOTATED.

Mr. Walter McElreath, of the Atlanta Bar, presents a volume under the above title, which is divided into three parts. The first considers "The Constitutional History of Georgia." That "history" runs from June 9th, 1732, which is the First Colonial Period down through "The Fourth Colonial Period" which ended with the declaration of independence. Then there are other periods, all numbering eleven, classified by the author culminating in what he calls "Restored Sovereignty and the Constitution of 1877."

Part II. embraces "Constitutional Documents" of English origin such as Magna Charta, etc., and seven different constitutions of the state and Part III. gives the constitution of 1877 as amended with decisions of the Supreme Court and Court of Appeals of Georgia thereon. It is thus perceived that a great part of this volume is somewhat historical in its nature and what annotation there is greatly confined to the provisions of the constitution of 1877. This annotation, however, is very extensive and seemingly exhaustive, consisting of full notes stating propositions approved by the cited cases. Indeed it may be said that by this annotation the cases in Georgia have been embraced in a digest classified by constitutional provisions. This is a new plan and apparently a practical way of showing the varied bearing of a fundamental law.

The volume is attractive in form and published by The Harrison Company, Atlanta, 1912.

AMERICAN DIGEST, VOL. 13, KEY-NUMBER SERIES—1911-1912.

This number brings the key-number digest in its permanent form down to March 1st, 1912, covering the months from November, 1911, to February, 1912, inclusive. The key system carries us back to 1658, in American law, a reflection of some interest as regards the new world, however such a statement would appear on the other side of the main.

This number 13 has nothing sinister in its appearance, and a superstition that would forbid its use would entail a considerable sacrifice, for a fellow who disregards it might get the other fellow "on the hip," and make his act a sort of prophylactic against its continuing. A superstition, anyway, is nothing more than a bad odor in one's own nostrils.

This volume 13 has 2,339 pages, exclusive of over 100 pages of the tables of cases digested and those affirmed, reversed, or modified by dicisions included in the volumes. These affirmances, etc., refer to cases heard in lower appellate courts and afterwards in court of very last resort.

The importance of "Words and Phrases" is again illustrated in this volume, there being twenty columns of references under this heading.

If you dont understand the key-number principle you had better learn it. It is here to stay and it is one thing new under the sun that is a joy that abideth forever.

The usual binding in law buckram goes with this volume, and there is the same finish generally that represents its publisher, the West Publishing Co., St. Paul, Minn.

HUMOR OF THE LAW.

A Louisville editor smarting under the immunity of lawyers from slander suits gets even by throwing off the following:

"A lawyer in a courtroom may call a man a liar, a scoundrel, villain or thief, and no one makes complaint when court adjourns. If a newspaper prints such a reflection on a man's character, there is a libel suit or a dead editor. This is owing to the fact that people believe what an editor says."

A young attorney, in examining a physician before a jury that had been called to inquire into the mental condition of a certain pauper, asked this question:

"Dr. X., in your opinion, what is the sanitary condition of this man?"

After a moment's hesitation, during which the physician evidently attempted to restrain a desire to shout, he replied:

"I think the learned counselor needs the expert testimony, not of a doctor, but rather that of a plumber."—Docket.

Judge Gaynor related a little anecdote while lying at the hospital, after the dastardly attempt on his life, which proved that the Mayor was cognizant of certain evils and not at all adverse to giving them publicity:

"I knew a man over my way," said the Judge with a smile, "who had formerly been a bartender. Going into politics, he was elected a police justice. With some dread he heard his first case. Mary McMannis was up before him for drunkenness. The ex-bartender looked at her for a moment, and then said, sternly:

"Well, what are you here for?"

"If yer please, yer Honor," said Mary, "the copper beyant pulled me in, sayin' I was drunk. An' I doan't drink, yer Honor; I doan't drink."

"All right," said the justice, absent-mindedly, "all right; have a cigar."—Green Bag.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Assignments for Benefit of Creditors**—Rights of Assignee.—The assignees for benefit of creditors of a contractor for public work took only the cause of action against the municipality that the contractor had, and subject to the equities given subcontractors.—Wackerbarth & Blamer Co. v. Independent School Dist. of Independence, Iowa, 138 N. W. 470.

2. **Bankruptcy**—Composition.—Fraudulent intent of a bankrupt must be shown to sustain a charge of obtaining money on credit on materially false statements in writing, urged in defense of an application to confirm a composition.—In re O'Callaghan, U. S. D. C., 199 Fed. 662.

3.——Conspiracy.—Bankrupt's trustee held entitled to sue for unlawful conspiracy, prior to bankruptcy, to transfer and conceal the bankrupt's goods to hinder and delay creditors.—Sattler v. Sionimsky, U. S. D. C., 199 Fed. 592.

4.——Exemptions.—Neither a firm nor the members thereof being entitled to exemptions under the South Dakota law, the holder of a lien against the firm, which was invalid as to the firm's general creditors, could not enforce the same against alleged exemptions.—In re I. S. Vickerman & Co., U. S. D. C., 199 Fed. 589.

5.——Recovery of Property.—A bankrupt's trustee cannot recover property transferred witnin four months prior to bankruptcy proceedings, unless the elements prescribed by Bankr. Act are shown to exist.—In re F. M. & S. Q. Carlile, U. S. D. C., 199 Fed. 612.

6.——Reimbursement. — Bankrupt's trustee held not bound to reimburse purchaser of real property for taxes paid on the land, which were levied and became a lien after the sale, but before a delivery of the conveyance.—In re Crowell, U. S. D. C., 199 Fed. 659.

7.——Trustee.—After a vote for trustee of a bankrupt had resulted in no election, and the referee was informed that an agreement was hopeless, he properly denied an application for an adjournment, and appointed a trustee on his own motion.—In re Goldstein, U. S. D. C., 199 Fed. 665.

8. **Bills and Notes**—Accomodation Maker.—An accomodation maker is primarily liable under negotiable instruments law as a principal debtor, notwithstanding an indulgence given to the indorser or drawer for whose benefit he became a party to the instrument.—Hunter v. Harris, Ore., 127 Pac. 786.

9.——Attorney Fee.—A stipulation in a note to pay 10 per cent. attorney's fees on default is a contract of indemnity, and not a penalty.—Brown v. Gatewood, Tex., 150 S. W. 950.

10.——Burden of Proof.—Where fraud is shown, the burden is on an indorser to show that he is a bona fide holder.—Central Nat. Bank v. Ericson, Neb., 138 N. W. 563.

11.——Consideration.—Where a creditor accepts in payment the note of a third party in an amount equal to the obligation of the original debtor and surrenders the original obligation, the note of the third party is supported by a sufficient consideration.—Bridges v. Vann, Kan., 127 Pac. 604.

12.——Negotiability.—An instrument directing the drawee to pay to the order of the payee named a specified sum, to be deducted from money due the drawer on a loan, signed by the drawer, and accepted by the drawee, is not a negotiable bill of exchange within Negotiable Instruments Law, § 210, but is only an equitable assignment of moneys due or to become due from the drawee to the drawer.—Tisdale Lumber Co. v. Piquet, 137 N. Y. Supp. 1021.

13.——Negotiability.—The negotiability of a note, otherwise negotiable, is not destroyed by a stipulation therein that the makers and indorsers will consent to any extension of time of payment, and partial payments before or after maturity.—Longmont Nat. Bank v. Loukonen, Colo., 127 Pac. 947.

14. **Boundaries**—Monuments.—Where there is a conflict between monuments on the ground as a part of the original survey and the field notes and plat as recorded, the survey as ascertained by the monuments is controlling.—Tomlinson v. Golden, Iowa, 138 N. W. 448.

15. **Building and Loan Associations**—Note of Member.—Where a note of a member of a building association for a loan was payable to the association or order, and the deed of trust provided for payment to the association, its successors, or assigns, the debt was assignable.—Leon v. Citizens' Building & Loan Ass'n, Ariz., 127 Pac. 721.

16. **Carriers of Goods**—Furnishing Cars.—A common carrier is liable to a shipper, for the failure to furnish cars, for such actual damages as were sustained by reason of any failure or default on its part to deliver the cars as requested.—Yazo & M. V. R. Co. v. Fisher Bros., Miss., 59 So. 877.

17.——Furnishing Cars.—Where a railroad company fails to furnish cars at a time verbally agreed on by its agent, and because of such failure, freight shipped fails to connect with a train of a connecting carrier and is damaged by delay, the company is liable therefor.—Midland Valley R. Co. v. George, Okla., 127 Pac. 871.

18. **Carriers of Live Stock**—Caretaker of Live Stock.—A caretaker in charge of a shipment of live stock, and riding free according to an established custom, was a passenger.—St. Louis, I. M. & S. Ry. Co. v. Loyd, Ark., 150 S. W. 864.

19.——Special Agreement.—Acceptance of cattle for shipment, after instructions from shipper that he desired them to arrive on a certain date held to establish a special agreement to deliver on that day.—Chesapeake & O. Ry Co. v. Ruckman, Va., 76 S. E. 278.

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